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**IN THE  
COURT OF APPEALS OF INDIANA**

THREE THOUSAND, FOUR HUNDRED, )  
SEVENTY-EIGHT DOLLARS IN UNITED )  
STATES CURRENCY; 6 UNKNOWN LONG )  
GUNS; and A BROWNING GUN SAFE, )

Appellant-Defendant,

VS.

STATE OF INDIANA and the KNOX COUNTY )  
POLICE DEPARTMENT, )

Appellees-Plaintiffs.

No. 42A04-0608-CV-445

APPEAL FROM THE KNOX SUPERIOR COURT  
The Honorable Jim R. Osborne, Judge  
Cause No. 42D02-0508-PL-185

**March 8, 2007**

## **MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

### **Case Summary**

Mike Hill<sup>1</sup> appeals the trial court's order directing the forfeiture of currency, several guns, and a gun safe. We reverse.

### **Issue**

The sole issue is whether there is sufficient evidence to support the forfeiture order.

### **Facts**

On July 15, 2005, police went to Hill's residence to investigate a tip that he was cultivating marijuana. Hill admitted that he was growing marijuana and directed officers to an outbuilding located sixty to seventy yards from his residence. There, police found twenty-eight marijuana plants in various stages of growth. Hill stated that he cultivated the marijuana for his own personal usage. The State presented no direct evidence that Hill ever sold the marijuana he grew, either through witness testimony or through a controlled buy.

After police found the marijuana plants in the outbuilding, Hill consented to a search of his residence. There, in a gun safe, police found \$3478 in cash and six long guns. There also were some marijuana seeds and alleged drug paraphernalia in the safe,

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<sup>1</sup> Technically, the Appellants in this case are \$3478, six guns, and a gun safe. For the sake of clarity we will be referring to Hill, the professed owner of these items, as the appellant.

and one of the paper bills had a picture of a marijuana leaf stamped on it. After these discoveries, the police arrested Hill on charges of possession of marijuana, possession of paraphernalia, and maintaining a common nuisance.

On August 22, 2005, the State, on behalf of the Knox County Police Department, filed a complaint for civil forfeiture of the cash, guns, and gun safe found in Hill's residence. There is no evidence in the record as to whether the State has yet charged Hill with any crimes. On June 27, 2006, the trial court ordered forfeiture of the cash, guns, and gun safe. Hill now appeals.

### **Analysis**

Forfeiture actions are properly classified as civil in nature. Katner v. State, 655 N.E.2d 345, 347 (Ind. 1995). In reviewing the sufficiency of evidence in a civil forfeiture case, we consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. Lipscomb v. State, 857 N.E.2d 424, 427 (Ind. Ct. App. 2006). "We neither reweigh the evidence nor assess the credibility of the witnesses." Id. We will affirm if there is substantial evidence of probative value to support the trial court's ruling and will reverse only if we are definitely and firmly convinced that a mistake has been made. Id.

"Forfeiture is, however, not totally divorced from the criminal law." Katner, 655 N.E.2d at 348. The seizure of property statute provides the State with a quick procedure that is both broad in scope and profitable to the State and allows seizure upon proof by a preponderance of the evidence. One 1968 Buick, 4 Door v. State, 638 N.E.2d 1313, 1317 (Ind. Ct. App. 1994). Conversely, the defendant can have his or her property taken

without the usual panoply of constitutional rules of criminal procedure afforded to criminal defendants. Id. (quoting Caudill v. State, 613 N.E.2d 433, 436 (1993)). Because of this, we have held that the forfeiture statute should be narrowly construed. Id.

Indiana Code Section 34-24-1-1(a)(2) allows the forfeiture of the following:

All money, negotiable instruments, securities, weapons, communications devices, or any property . . . commonly used as consideration for a violation of IC 35-48-4: . . . furnished or intended to be furnished by any person in exchange for an act that is in violation of a criminal statute; . . . used to facilitate any violation of a criminal statute; or . . . traceable as proceeds of the violation of a criminal statute.

Subsection (a)(3) of the statute allows forfeiture of, “Any portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute.” Additionally, Indiana Code Section 34-24-1-1(d) states:

Money, negotiable instruments, securities, weapons, communications devices, or any property commonly used as consideration for a violation of IC 35-48-4 found near or on a person who is committing, attempting to commit, or conspiring to commit any of the following offenses shall be admitted into evidence in an action under this chapter as prima facie evidence that the money, negotiable instrument, security, or other thing of value is property that has been used or was to have been used to facilitate the violation of a criminal statute or is the proceeds of the violation of a criminal statute:

\* \* \* \* \*

(8) IC 35-48-4-10 (dealing in marijuana, hash oil, or hashish) as a Class C felony.

The State seeks to rely on this statutory presumption to support the forfeiture of Hill’s property, asserting that the cash, guns, and gun safe were found on or near Hill while he

was committing, attempting to commit, or conspiring to commit Class C felony dealing in marijuana.

At the outset, we note that there is no evidence in the record that Hill has been charged with, let alone convicted of, Class C felony dealing in marijuana. State Police Trooper Kim Reardon testified that she arrested Hill “for possession of marijuana and possession of paraphernalia.” Tr. p. 16. These crimes would be, at the most, Class D felonies and outside the scope of the forfeiture statute’s presumption. See I.C. § 35-48-4-11. It is true that conviction on the underlying criminal activity is not a prerequisite for forfeiture. Katner, 655 N.E.2d at 348. However, clearly it requires more evidence and effort on the State’s part to establish grounds for forfeiture where there is no conviction for an underlying offense, nor even any evidence that the defendant has been charged with an underlying offense.

Dealing in marijuana is a Class C felony if the amount involved is more than ten pounds, or if the person “delivered or financed the delivery” of marijuana within 1000 feet of school property, a public park, a family housing complex, or a youth program center. I.C. § 35-48-4-10(b)(2). Hill’s growing operation was within 1000 feet of a public park. However, there was no evidence presented that Hill ever “delivered or financed the delivery” of marijuana at his residence and/or the outbuilding where the marijuana plants were growing. Class A misdemeanor dealing in marijuana can be committed by “manufacturing” or “financ[ing] the manufacture” of marijuana, as well as “delivering” or “finac[ing] the delivery” of it. I.C. § 35-48-4-10(a). However, for elevation to a Class C felony based on proximity to a park, the statute does not include

manufacturing (i.e., growing) of marijuana as a basis for liability—only delivery or financing delivery. Additionally, the State did not present evidence as to the total weight of the marijuana it seized, meaning there is no evidence that it weighed more than ten pounds. There is insufficient evidence that Hill was committing, attempting to commit, or conspiring to commit Class C felony dealing in marijuana when his property was seized; therefore, the statutory presumption cannot apply here.

Nevertheless, the State argues that the evidence in this case that the cash, guns, and gun safe were connected to Hill's illegal marijuana growing is sufficient to justify forfeiture. In Lipscomb, we recently reversed a forfeiture order on facts similar to the ones in this case. There, police had arranged three controlled purchases of cocaine from the defendant. More than two weeks later, police arrested the defendant for Class B felony dealing in cocaine. At the time of his arrest, the defendant had in his possession \$1952 in cash and a container with cocaine residue in it. The State sought forfeiture of the cash. A police officer testified at the forfeiture hearing that he believed the seized money was related to drug dealing because the defendant was unemployed and driving an expensive vehicle and that drug dealers are known to keep large amounts of drug money on their person or in their house. However, none of the seized money could be directly linked to any drug sales, including the earlier controlled buys.

We first held that although the defendant had pled guilty to Class B felony dealing in cocaine based on the controlled buys, and Class B felony dealing in cocaine is one of the enumerated crimes under the forfeiture statute that allows a presumption of forfeiture, the presumption did not apply. Lipscomb, 857 N.E.2d at 428. This was because there

was no evidence that the defendant was dealing in cocaine when the money was seized; at most, he was committing Class D felony possession of cocaine. The controlled buys that formed the basis of the Class B felony dealing conviction had occurred well before the defendant's arrest and seizure of the money. Id. Holding that the statutory presumption did not apply, we also held that the evidence presented at the forfeiture hearing was not sufficient to establish by a preponderance of the evidence that the money was connected to drug dealing. Id. at 428-29. We stated that such a conclusion would be based impermissibly "on mere speculation and conjecture." Id. at 429.

The facts in this case are even less supportive of forfeiture than those in Lipscomb. Unlike that case, there were no controlled buys here or any other direct evidence that Hill ever sold marijuana.<sup>2</sup> Hill testified that the marijuana he was growing was for personal use, and the State presented no contrary evidence suggesting that the amount of marijuana he was growing was inconsistent with such a claim and more consistent with dealing. Two law enforcement officers testified at the forfeiture hearing that they believed, based on their training and experience, the money came from the sale of marijuana. The officers' testimony was generic and gave no explanation or basis for their belief specific to this case. Similar testimony was given with respect to the guns, namely that drug dealers often kept weapons for their protection or that weapons instead of cash often were traded for drugs; again, no information or evidence specific to Hill was

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<sup>2</sup> The State presented no evidence, for example, of having found other indicia of drug dealing at Hill's residence, such as scales or unexplained ledgers, or any witness who said Hill sold marijuana. The State also presented no evidence as to what type of alleged drug paraphernalia officers found in the gun safe. Additionally, the anonymous tip that led to this investigation alleged marijuana growing, not dealing.

offered to connect the guns with marijuana dealing. Hill had other sources of income available to him, including disability benefits, a small shaved ice business, and a fairly recent cash-out refinancing of his home. Also unlike Lipscomb, there was no evidence that Hill was living well beyond his stated means and, for example, driving an expensive car. Cf. also Jennings v. State, 553 N.E.2d 191, 193 (Ind. Ct. App. 1990) (holding there was sufficient evidence to support forfeiture of large amount of cash seized from unemployed defendant who had concealed in his car an amount of marijuana consistent with dealing). Finally, the fact that one of the seized dollar bills had a picture of a marijuana leaf stamped on it does not prove that it was related to marijuana dealing, as opposed to simply being placed there by someone who enjoys smoking large quantities of the drug.

It is fair to speculate and conjecture that Hill might have been selling the marijuana he was growing and that the money found in his safe might have been connected to such sales, but speculation and conjecture alone is not enough to support forfeiture. See Lipscomb, 857 N.E.2d at 429. There is even less reason for speculation and conjecture with respect to the guns. Consistent with our strict construction of the forfeiture statute, we hold there is insufficient evidence to support the forfeiture of the \$3478, the gun safe, and the guns found therein.

### **Conclusion**

The statutory presumption regarding forfeiture of property does not apply in this case, and there is insufficient evidence to support forfeiture in the absence of that presumption. We reverse the forfeiture order.

Reversed.

BAILEY, J., and VAIDIK, J., concur.